No. 89-61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FILIBERTO OJEDA RIOS, ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* THE ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE INSTITUTO PUERTORRIQUENO DE DERECHOS CIVILES, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD

ROBERTO ROLDAN BURGOS
CHARLES HEY MAESTRE
Instituto Puertorriqueno de Derechos Civiles
Calle Blanco Romano No. 7
Tercer Piso
Rio Piedras, Puerto Rico 00925
(809) 754-7390

SARA E. RIOS
DAVID D. COLE
(Counsel of Record)
Center For Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

56pp

QUESTIONS PRESENTED

Whether the "locally inapplicable" Clause of the Federal Relations Act and the ban on wiretapping in Puerto Rico's Constitution render the wiretapping provisions of the Omnibus Crime Control and Safe Streets Act inapplicable in Puerto Rico, thus requiring suppression of all conversations wiretapped in Puerto Rico pursuant to the Crime Control Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONS

STATUTES

OTHER LEGAL REFERENCES

CONSENT OF THE PARTIES

The parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF AMICI

Amici are aware of the great significance of the instant appeal. Amici also recognize the threat to privacy rights that would result from the virtually unrestricted use of electronic surveillance which would result if the government's interpretation of the immediate sealing requirement in the wiretapping provisions of the Omnibus Crime Control and Safe Street Act should prevail. With this in mind, amici wish to provide the Court with a valuable and unique perspective on the interests

asserted in this case.

Amici will not, however, undertake a discussion of or address themselves to the proper interpretation of the sealing requirements in the Crime Control Act; arguments which are set forth fully and most adequately by respondents in their briefs. The issues we will address direct themselves to a presentation of the historical development of the relationship between the U.S. and Puerto Rico, promises and representations that were made as that relationship developed to its current state and how those promises and representations must inform resolution of the questions before the court. Amici believe the issues presented by this case are of great public interest, and that they can assist this Court in giving those issues full and careful consideration.

The Asian-American Legal Defense and Education Fund (AALDEF) is a national civil rights organization committed to the defense of civil liberties and privacy rights. AALDEF's current program priority areas address the rise of anti-Asian violence, immigrant rights, employment and labor rights, voting rights, and redress for Japanese Americans who were interned during World War II and had their civil and constitutional rights violated by the U.S. Government. AALDEF joins amici in opposing the application of the wiretap provisions of the Omnibus Crime Control and Safe Streets Act to Puerto Rico. Such application constitutes a violation of the laws and conditions governing the relationship between the United States and Puerto Rico.

The Center for Constitutional Rights (CCR) is a non-profit law collective born in 1966 out of the southern civil rights struggle. CCR was founded by attorneys dedicated to the creative use of law as a vehicle for social change. CCR has litigated cases supporting Puerto Rican self-determination and views this case as a particular threat to Puerto Rico's autonomy. CCR together with the Instituto Puertorriqueno de Derechos Civiles litigated Camacho v. Autoridad de Telefonos, 868 F.2d 482 (1st Cir. 1989). CCR views the applications of the Omnibus Crime Control and Safe Streets Act as a direct threat to Puerto Rican autonomy.

The Instituto Puertorriqueno de Derechos Civiles (Instituto) is a non-profit legal organization established in 1982. Its purpose is to use its legal expertise to defend and expand human and

civil rights in Puerto Rico. It has become prominent and enjoys great prestige in Puerto Rico and the United States for legal work which fosters social change and promotes self-determination in Puerto Rico. Together with the Center for Constitutional Rights the Instituto litigated Camacho v. Autoridad de Telefonos, 868 F.2d 482 (1st Cir. 1989) and is well versed on the issues presented in this brief. The Instituto joins amici in opposing application of the wiretapping provisions of the Omnibus Crime Control and Safe Streets Act to Puerto Rico.

The National Conference of Black Lawyers (NCBL) is an organization of judges, lawyers, and law students whose principle concern is with the uses of the law to bring about racial justice and equality. The NCBL views colonialism and

the imposition of inferior status on a nation, as one particularly pernicious form of inequality, which is in violation of the United States Constitution, as well as international law.

The National Lawyers Guild (NLG) is an organization of lawyers, law students and legal workers. Since its inception in 1937, it has been dedicated to providing vigorous representation to individuals whose political views and expressions have resulted in unjust criminal prosecution. The NLG has long been active in providing representation to a wide array of individuals and organizations seeking a free and independent Puerto Rico.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth by the appellees herein.

SUMMARY OF ARGUMENT

The Puerto Rico Bill of Rights specifically and absolutely forbids wiretapping whether by government authorization or by private persons. P.R. Constit. art II, §10. Under the Puerto Rico Federal Relations Act, 48 U.S.C. §§731-916 (1981), specifically §734, U.S. statutes which are "locally inapplicable" may not be given effect in Puerto Rico. In view of Puerto Rico's Constitution, the Omnibus Crime Control and Safe Streets Act 18 U.S.C. §§ 2510-2521 (1979) is clearly inapplicable to the extent that it authorizes electronic eavesdropping. Despite the Crime Control Act's representations of applicability to Puerto Rico, the Congress of the United States can not unilaterally make it so by simple Congressional supremacy, as the relationship between Puerto Rico and the

U.S. is governed by a mutual compact. Therefore, the tapes at issue in the case at bar must be suppressed as the fruits of illegal wiretaps.

ARGUMENT

I. The Tapes At Issue Herein, Secured Pursuant To The Omnibus Crime Control And Safe Streets Act, Must Be Suppressed As The Federal Relations Act Together With Article II Section 10 of Puerto Rico's Constitution Make The Wiretapping Provisions Of The Crime Control Act Inapplicable In Puerto Rico.

The provisions of the Puerto Rico Federal Relations Act, 48 U.S.C. §§731-916 (1981), (hereinafter Federal Relations Act), and the ban on wiretapping in Puerto Rico's Constitution together render the provisions authorizing wiretapping in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510-2521 (1979) (hereinafter Crime Control Act)

inapplicable in Puerto Rico. Section 734 of the Federal Relations Act, specifically provides, in part, that "(t)he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States." The currently existing anti-wiretapping provision in Puerto Rico's Constitution, Art. II, §10, enacted subsequent to enactment of the Federal Relations Act and well in advance of the Crime Control Act, is an absolute ban which triggers the "locally inapplicable" provision and renders the wiretapping provisions of the Crime Control Act inapplicable in Puerto Rico.

The local inapplicability to Puerto Rico of the Crime Control Act wiretapping provisions can be seen by examining the

nature of the relationship between the United States and Puerto Rico as it was shaped by the historical and legal developments which led to the adoption of the Puerto Rico Constitution and the creation of the Commonwealth of Puerto Rico. The Federal Relations Act which established the legal framework for the current Puerto Rico-United States relationship, also mandates the conclusion of local inapplicability of the wiretap provisions of the Crime Control Act.

A. The Commonwealth Constitution's Wiretapping Prohibition Is an Integral And Indispensable Part of the Constitutional And Statutory Right To Privacy in Puerto Rico And A Cornerstone of Puerto Rican Cultural Values.

Article II, Section 10 of the Puerto Rico Constitution establishes clearly that: "wiretapping is prohibited". As stated by the Puerto Rico Supreme Court,

this clause is an integral part of the general right to privacy in Puerto Rico. The right to be free from wiretapping responds to the specific intent to bar, without any doubt, unconsented intrusion into telephone communications. P.R. Tel. Co. v. Martinez, 114 P.R.Dec. 328 (1983). Insofar as this provision is part of the Commonwealth Constitution Bill of Rights, it reflects an aspiration that is part of the definition of Puerto Ricans as a people. It is a fundamental right in Puerto Rico. See Puerto Rico Civil Rights Commission Report 1970-CDC-014, 2 Der. Civ. 27, 60-61 (1970); P.R. Civil Rights Commission Resolution (March 26, 1985).

The debates and discussion by the Puerto Rico Constitutional Assembly not only support this conclusion by the Puerto Rico Supreme Court, but also

reflect the Assembly's awareness of specific attempts to curtail privacy regarding telephone conversations. The delegates' purpose was to defeat these attempts. In response to a question by a delegate concerning the wiretapping provision as a specific component of a much broader right to privacy, another delegate answers:

> Mr. Benitez: . . . That is exactly so. In one case we have the generic principle of the autonomy of privacy, of the right of privacy, and in the other case there is a specific mention of the telephone because there have been concrete attempts to do violence on said privacy, and hence, we are specifically barring them.

3 Diario de Sesiones de la Convencion Constituyente, at 1586 (English version taken from the unpublished official translation by the Puerto Rico Supreme Court in P.R. Tel. Co., 114 P.R.Dec. at 340-341, n. 10).

It is not by chance that Puerto Rico guarantees a right to privacy greater than what is contemplated in the United States. It has been fully recognized by the Puerto Rico Supreme Court that the Constitutional Convention intended to establish in Puerto Rico a right to privacy much broader than the right to privacy that has been interpreted to emanate from the "penumbras" of the Bill of Rights of the U.S. Constitution. This broader right to privacy reflects cultural and historical differences between the framers of the U.S. and Puerto Rico constitutions, regarding their respective conceptualization of the nature of the individual. Additionally, the models for the Puerto Rico Constitutional Assembly were the Universal Declaration of Human Rights, December 10, 1978, G.A.R. 217A (III),

U.N. Gen. Ass. Off. Rec., 3rd Sess. Part 1, Resolutions, p. 71, and the American Declaration of Rights and Obligations of Man, Res. XXX, Ninth International Conference of American States, (Report of the Delegation of the U.S.), Department of State Pub. 3263 at 167-70 (1948), rather than the U.S. federal Constitution. See, P.R. Tel. Co., 114 P.R. Dec. at 338, Figueroa Ferrer v. E.L.A., 107 P.R.Dec. 250, 258-259 (1978); E.L.A. v. Hermandad de Empleados, 104 P.R.Dec. 436, 439-440 (1975); Cortes Portalatin v. Hau Colon, 103 P.R.Dec. 734, 738 (1975); Arroyo v. Rattan Specialties, 86 J.T.S. 20 (March 5, 1986).

The Puerto Rico Constitutional Right to privacy has been found to operate ex proprio vigore, and even to be applicable directly against private parties: Colon

v. Romero Barcelo, 112 P.R.Dec. 573 (1982); Sucesion de Victoria v. Iglesia Pentecostal, 102 P.R.Dec. 20 (1974). The right to privacy can be protected by an injunction, Sucesion de Victoria, 102 P.R.Dec. at 29-30. In cases where the right to privacy has been weighed against other Commonwealth constitutional rights, such as freedom of speech, E.L.A. v. Hermandad de Empleados, 104 P.R.Dec. at 446-447; Colon, 112 P.R.Dec. at 581-582; right to free exercise of religion, Sucesion de Victoria, 102 P.R.Dec. at 29-30; and property rights, Torres v. Rodriguez, 101 P.R.Dec. 177 (1973), it has been consistently favored.

Since 1953 the constitutional ban on wiretapping has been incorporated into the Penal Code of Puerto Rico, thus making unconsented wiretapping a felony. See P.R.Law Ann. 33 §4187 (1984). This

was a result of the understanding on the part of the Government of Puerto Rico that its commitment to the people of Puerto Rico regarding wiretapping was not only to refrain from wiretapping itself but to prevent any private person from wiretapping.

The explicit prohibition on wiretapping in Puerto Rico's constitution, which clearly expresses a fundamental value of Puerto Rican society must be recognized, under Sec. 734 of the Federal Relations Act, as rendering the wiretapping provisions of the Crime Control Act locally inapplicable.

B. The "Locally Inapplicable" Clause of the Federal Relations Act Should Be Interpreted To Afford Broad Deference And Respect Toward The Will of the Puerto Rican People As Expressed In Their Constitution.

The historical process which took place between Congress and the people of

Puerto Rico and which established the current relationship between the two countries created a unique relationship that must govern the interpretation of the Federal Relations Act locally inapplicable clause. Three points are particularly relevant here: 1) the Commonwealth of Puerto Rico is a result of a concerted effort by the Congress of the U.S. and the people of Puerto Rico to create what was then considered by some to be a more dignified and mutually respectful relationship; 2) neither of the parties to the Federal Relations Act can change the essential terms of U.S.-Puerto Rico relations unilaterally; and 3) the ban against wiretapping of Article II, §10 of the Commonwealth Constitution was analyzed, studied, accepted and approved by Congress along with the rest of that document. Pursuant to the

Federal Relations Act, and given its importance, Art. II, §10 must be considered an indispensable element of the compact between the two countries.

The Federal Relations Act is the statute that governs the relationship between Puerto Rico and the United States. Section 734 of this law, specifically provides in part that "(t)he statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States." (emphasis added.) This legal disposition cannot be interpreted in a vacuum. First, notice should be taken that Public Law 600 (64 Stat. 314, 48 U.S.C. 731), which created the Puerto Rico Federal Relations Act was approved and "adopted in the nature of a compact",

48 U.S.C. §731(b).[1] It authorized Puerto Rico to organize a government based on a constitution of its own adoption.[2] Id. Article 4 of Public Law 600 provided that the Jones Act of 1917 would continue in force, except for certain provisions, and that it would be known as the Puerto Rico Federal Relations Act. Therefore, both the political negotiations process which took place between Puerto Rico and the Congress, and the constitutional document which was drafted by Puerto Ricans and reviewed by the Congress, are of paramount importance for the

[1] Black's Law Dictionary defines "compact" as: "an agreement; a contract. Green v. Biddle, 8 Wheat. 1, 92, 5 L. Ed. 546. Usually applied to conventions between nations or sovereign states." Black's Law Dictionary, 351 (4th ed 1968). See also discussion at B1 and B2 herein.

[2] It must be noted that the United States reserved for itself the right to approve any constitution adopted by the people of Puerto Rico.

interpretation of the "not locally inapplicable" clause.

Second, when interpreting the "not locally inapplicable" clause, special attention should be given to the unique situation of Puerto Rico within the United States framework, as recognized by this Court in Examining Board v. Flores de Otero, 426 U.S. 572 (1976) and the First Circuit in Cordova and Simonpietri Insurance Agency v. Chase Manhattan Bank, 649 F.2d 36 (1st Cir. 1981). This Court recently reiterated that:

> A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico. See, Diaz v. Gonzalez, 261 U.S. 102, 105-106... (1923) (Holmes, J.) ("This Court has stated many times the deference due to the understanding of local courts upon matters of purely local concern... This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which

> prevails here.") (citations omitted).

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 341, n.6 (1986). Similarly, deference is due to the interpretations of the Puerto Rico Constitutional Convention, Puerto Rico Supreme Court, Puerto Rico Legislature and the Puerto Rico Civil Rights Commission regarding the nature and scope of the Bill of Rights contained in the Commonwealth Constitution. This is especially so in light of the "compact" nature of Puerto Rico-U.S. relations, in which neither party can unilaterally alter its substantive terms.

1. **The History of the Relationship Between the U.S. and Puerto Rico Makes Clear That Statutes Contrary to Puerto Rico's Constitution Must Be Declared To Be Locally Inapplicable.**

During the first two years of control by the United States (1898-1900), Puerto Rico was governed by military and presidential authority. Santiago v. Nogueras, 214 U.S. 260 (1913). See also, 1 J. Trias Monge, Historia Constitucional de Puerto Rico, 163-164 (1st ed. 1980). Local pleas for an end to the military government forced Congress to undertake the task of creating and establishing a new regime. Bothwell, Transfondo Constitutional de Puerto Rico, Primera Parte, 1887-1914, 39 (3rd ed. 1971).

The Foraker Act, which superseded the military government, was approved on April 12, 1900. See, P.R. Laws.Ann. 1 §§1-41 (1982),(Historical Documents, at 37). The Foraker Act established that the laws approved by the Puerto Rico Legislature (newly established by that same Act) could be annulled or vetoed by

Congress. It also provided that the applicability of federal law was governed by the following section: "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter, provided, shall have the same force and effect in Porto Rico (sic) as in the United States, except the internal revenue laws which in view of the provisions of section three shall have the same force and effect in Porto Rico (sic)." P.R. Laws Ann. 1 §14.

Despite the Foraker Act, the constitutional relationship between Puerto Rico and the United States remained unclear. This Court tried, in the so-called "Insular Cases", to clarify the nature of the relationship. See e.g., DeLima v. Bidwell, 182 U.S. 1 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 182 U.S.

151 (1901) and Gonzalez v. Williams, 192 U.S. 1 (1903). From these cases it could be concluded that Puerto Rico was a territory belonging to, but not part of the United States.

In 1917, the Jones Act was approved, superseding the Foraker Act. The distinguishing characteristic of this legislation was the extension to the inhabitants of Puerto Rico of United States citizenship. Regarding the applicability of federal law, Article 14 of the Foraker Act was restated as Article 7 of the Jones Act. Although the Jones Act extended U.S. citizenship to Puerto Ricans, Puerto Ricans were never consulted regarding the change in their status. Puerto Rico was still a territory belonging to, but not a part of, the United States. Certain constitutional rights considered to be

fundamental rights (such as the right to vote), were not extended to it. Balzac v. People of Puerto Rico, 258 U.S. 298 (1922).

On February 10, 1943, the Puerto Rico Legislative Assembly approved Joint Resolution No 1 (Laws of Puerto Rico, 1943) in which it stated that it was the wish of the people of Puerto Rico to put an end to their colonial status and determine by special democratic and free elections their own political status. A permanent delegation to work on accomplishing the objectives stated in the Joint Resolution was subsequently created. On March 9, 1943, President Roosevelt recommended to Congress an amendment to the Jones Act in order to confer upon the people of Puerto Rico the right to elect their own governor and to establish clearly the functions and

authority of the Federal and Commonwealth Governments respectively. The President also created a commission to advise him in this regard. See, 1 J. Trias Monge, Historia Constitutional, at 280.

The Commission submitted to the President its recommendations in the form of a proposed bill. The first article of this proposed bill read:

> It is further declared to be the intention of Congress that no further changes in the Organic Act shall be made except with the concurrence of the people of Puerto Rico or their duly elected representatives

Id.

The bill was not enacted. In 1947, a new bill was prepared which was approved by Congress and subsequently signed by the President on August 5, 1947. The governor of Puerto Rico would be, for the first time in history, elected by the Puerto Rican people. See id. at 293-

315.

On March 13, 1950, Puerto Rico's Resident Commissioner Fernos-Isern presented to Congress a bill, H.R. 7674 81st Cong., 1st. Sess. (1950), to enable the people of Puerto Rico to organize a government pursuant to a Constitution of their own adoption. Articles 1 and 2 of that bill read:

> Upon the acceptance of this Act by the people of Puerto Rico and their adoption of a constitution, in accordance with procedures prescribed by the laws of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of this Act and of the Constitution of the United States.
>
> Fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact, and so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption. (emphasis added).

Quoted in III J. Trias Monge, Historia Constitutional de Puerto Rico, at 38-41. This bill was amended, approved by Congress, and was signed by President Truman on July 3, 1950, becoming Pub. Law 600 of the 81st Congress. 64 Stat. 319. The language establishing that the Act was adopted in the nature of a compact remained unchanged and established the alleged bilateral nature of the relationship between Puerto Rico and the United States.

To insure that the terms of the new relationship would truly be that of a compact, Pub. Law 600 established a novel procedure for the accomplishment of its objectives. First, the people of Puerto Rico would have to approve the terms it established through an island-wide referendum. Second, if approved by the people of Puerto Rico, then the Puerto

Rico Legislative Assembly would call a Constitutional Convention in order to frame a constitution. Third, after framing the constitution, the people of Puerto Rico had to adopt it before sending it to the President. Fourth, after its adoption by the people of Puerto Rico, the Constitution would be sent to the President, who would determine if the constitution was in accordance with Pub. Law 600 and the U.S. Constitution. Fifth, if the President found that the constitution was in accordance with the U.S. Constitution and Pub. Law 600, he would then send it to Congress for its approval.

This mechanism was designed to create an alleged compact between the government of the United States and the people of Puerto Rico, who were recognized as having a primary yet not decisive role to

play in the establishment of the new relationship. Congress did not merely seek to benevolently confer new political liberties upon Puerto Rico. It sought, with ample participation of the Puerto Rican people, to create what the United States government considered to be a more dignified and mutually respectful relationship between the United States and Puerto Rico. The United States government, however, retained the final right of approval.

The procedure established by Pub. Law 600 was rigorously followed. After the initial referendum, election of delegates, and the convention itself, the Constitution was sent to the President. It was accompanied by a Resolution stating, inter alia, that the people of Puerto Rico retained the right to propose and accept modifications to the terms of

their relationship with the U.S. so as to guarantee that the relationship would always be the free expression of a mutual agreement between the people of Puerto Rico and the United States. Resolution No. 22 of the Constitutional Convention, Historical Documents, P.R.Law Ann.1, Historical Documents at 147-149. The President and Congress of the U.S. received and were aware of this understanding which without question established that the terms of the relationship between Puerto Rico and the U.S. could not be unilaterally altered.

On April 22, 1952, President Truman sent the Constitution to Congress with his approval, stating:

> Through the act of July 3, 1950, providing for the establishment of a constitutional government in Puerto Rico, the United States gives evidence once more of its adherence to the principle of self-determination and its

> devotion to the ideals of freedom and democracy. The people of Puerto Rico have accepted the law as enacted by the Congress. They have complied with its requirements and have submitted their constitution for the approval of the Congress. With its approval, full authority and responsibility for local self-government will be vested in the people of Puerto Rico. The Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed. No government can be invested with a higher dignity and greater worth than one based upon the principle of consent.
>
> The Constitution of the Commonwealth of Puerto Rico is a proud document that embodies the best of our democratic heritage. I recommend its early approval by the Congress. (emphasis added)

II J. Trias-Monge, at 272-273.

Later that year, the Puerto Rico Constitutional Convention accepted the

amendments proposed by Congress.[3]

2. Official Representations by the United States to the United Nations Confirm the Nature of the Compact and the United States Commitment to an Absolute Respect for the Commonwealth Constitution.

Representations made by the United States to the United Nations confirm and emphasize the importance of what the U.S. characterized as Puerto Rican self-government and the bilateral nature of the compact between the United States and Puerto Rico.

On January 19, 1953, the United States

[3] After public hearings and debates Congress conditioned final approval of the Constitution on the elimination of the sections establishing certain economic and social rights; amendment of the Commonwealth obligations within the broader right to education; and amendment of Article VII, Section 3 establishing that no amendment to the Constitution could conflict with the congressional resolution approving the Constitution, the U.S. Constitution, the Federal Relations Act or with Public Law 600 adopted in the nature of a compact.

formally requested that it be relieved of its obligations under Article 73(e) of the United Nations Charter regarding the classification of Puerto Rico as a non-autonomous territory, in light of the creation of the Commonwealth. In his speech of August 28, 1953 before the U.N. Commission on Non-Autonomous Territories, the U.S. representative called attention to the fact that the "Commonwealth constitution . . . constitutes a compact between the American people and the people of Puerto Rico. A compact, as you know, is much stronger than a treaty. A treaty generally can be renounced by either of the parties without the permission of the other." See, Fernos-Isern, Estado Libre Asociado de Puerto Rico, Antecedentes, Creacion y Desarrollo Hasta la Epoca Presente, at 234-235 (1974). The U.S. representative also

referred directly to the Puerto Rico district court decision in Mora v. Torres, 113 F. Supp. 309 (P.R.Dec. 1953), holding that neither the Congress nor the people of Puerto Rico can unilaterally alter the compact without the consent and approval of the other party.

Another U.S. delegate to the U.N., Ohio Congressman Francis P. Bolton, who was also a member of the House Committee on Foreign Affairs, stated before the U.N. Fourth Commission:

> A fundamental feature of the new constitution is that it was entered into in the nature of a compact between the American Congress and Puerto Rico. This arrangement has been described by Senator Butler of Nebraska, Chairman of the Senate Committee on Interior and Insular Affairs and co-sponsor of Public Law 600, as a relationship between two parties which may not be amended or abrogated unilaterally .
>
> ...(T)here exists a bilateral compact of association between the people of Puerto Rico and the

United States which has been accepted by both and which in accordance with judicial decisions may not be amended without common consent.

The nature of the relations established by compact between the people of Puerto Rico and the United States, far from preventing the existence of the Commonwealth as a fully self-governing entity, gives the necessary guarantees for the untrammeled development and exercise of its political authority. The authority of the Commonwealth is not more limited than that of any State of the Union; in fact, in certain aspects it is much wider . . .

The present status of Puerto Rico is that of a people with a constitution of their own adoption, stemming from their own authority, which only they can alter or amend. The relationships previously established also by a law of the Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.

Quoted in IV J. Trias-Monge, Historia Constitucional de Puerto Rico, at 45-46 (1st ed. 1980).

The 8th U.N. General Assembly,

accepted the representations by the U.S. and relieved the U.S. of the obligation to transmit information regarding Puerto Rico.[4]

In its Resolution, the General Assembly stated that it:

3. Recognizes that the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status ...

4. Recognizes that, when choosing their constitutional and international status, the people of the Commonwealth of Puerto

[4] Notwithstanding this action, for the past 15 years the United Nations has continued to recognize Puerto Rico's colonial status. As recently as 1986, the United Nations Special Committee on Decolonization, created to implement the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples, resolved to keep the question of Puerto Rico status open for review.

Nonetheless, these subsequent developments at the U.N. do not alter the alleged pledge of greater self-determination for Puerto Rico made by the U.S.; a pledge to which the U.S. claims continued commitment.

Rico have effectively exercised their right to self-determination;

> 5. Recognizes that, in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity . . .

.

Based on representations made by the United States to the United Nations and on the U.N.'s response it is clear that all parties intended to commit themselves to a compact relationship of mutual respect, which at the very least, mandated absolute respect for the Puerto Rico Constitution. It is also clear that all parties involved understood that the provisions of the compact, of which the Constitution is unquestionably one, could not and can not be unilaterally altered

as application of the Crime Control Act's wiretapping provisions would do.

C. The Congress Can Not Abrogate Or Alter A Fundamental Clause of the Commonwealth Constitution.

The United Nations ratification of the U.S.-Puerto Rico compact was followed, in 1961, by a further recognition of the respect and deference to be accorded the Commonwealth and its legal order in this relationship. This took the form of an executive memorandum by President John F. Kennedy to all heads of departments and agencies which reads, in part:

> Because of the importance and significance of Puerto Rico in the relations of the United States with Latin America and other nations, it is essential that the executive departments and agencies be completely aware of the unique position of the Commonwealth, and that policies, actions, reports on legislation, and other activities affecting the Commonwealth should be consistent with the structure and basic principles of the Commonwealth . . . .

> The Commonwealth structure, and its relationship to the United Stats which is in the nature of a compact, provide for self-government in respect of internal affairs and administration, subject only to the applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act, and the acts of Congress authorizing and approving the constitution. . . .
>
> All departments, agencies, and officials of the executive branch of the Government should faithfully and carefully observe and respect this arrangement in relation to all matters affecting the Commonwealth of Puerto Rico....

Presidential Document No. 61-703 Fed. Reg. 6695 (1961).

In a speech to the Judicial Conference for the First Circuit on November 4, 1985, Puerto Rico Governor Rafael Hernandez Colon, Esq., eloquently amplified President Kennedy's point:

> Indeed, I submit that Commonwealth status and the compact relationship requires more deferential federal court supervision than that afforded the federated states. As

> the Supreme Court has suggested, the difference in language and culture between the two sovereignties make federal court deference to Puerto Rican law, and Puerto Rican political compromises, particularly appropriate. My contention does not rest on the general federalism claim of states and local governments . . . (f)or while federal courts may properly rely, in rejecting the federalism claim, on the states access to the political process. . .such reliance is inappropriate in the case of Puerto Rico.

47 Revista del Colegio de Abogados de Puerto Rico, Colon, Speech to the Judicial Conference of the First Circuit, at 13, (1985).

This Court has recently reaffirmed the autonomy inherent in the Commonwealth status. See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986). This autonomy does not mean that Congress cannot apply any legislation to Puerto Rico. Rather, it is the basis for the conclusion that

Puerto Rico constitutional law, while "like" that of a state, is in fact more autonomous and deserving of greater deference by the federal judicial system. See Posadas de P.R. Associates, 478 U.S. at 339-40.

By including the "locally inapplicable" language in the Federal Relations Act, Congress also recognized and accepted this greater degree of autonomy for Puerto Rico's constitutional law.[5] It is a central part of the

[5] P.R. Department of Consumer Affairs v. Isla Petroleum, 485 U.S. 495 (1988), is inapposite as it dealt with the preemption of Commonwealth statutory law by U.S. federal legislation and not preemption of a provision in Puerto Rico's Constitution, a law which holds a much higher status. To view this case otherwise would fly in the face of all representations made and obligations undertaken by the U.S. to respect Puerto Rico's constitutional law and alleged Puerto Rican self-government throughout the development of the current relationship between the U.S. and Puerto Rico.

structure of the Commonwealth relationship. It can not be limited without impermissibly distorting and undermining the basis of the U.S.-Puerto Rico compact.[6]

The U.S.-Puerto Rico compact relationship has been sealed. There can be no significant alteration of this relationship without bilateral participation and agreement. Thus, given the clear language of the Puerto Rican Constitution, the wiretapping provisions

[6] Case law which endow Congress with the power to apply legislation to Puerto Rico which has the effect of invalidating a component of the Commonwealth Constitution, must be overruled if representations made throughout the historical development of the current U.S.-Puerto Rico relationship are to be taken seriously. See e.g., Camacho v. Autoridad de Telfonos, 868 F.2d 482 (1st Cir. 1989) and U.S. v. Quinones, 758 F.2d 40 (1st cir. 1986).

of the Crime Control Act cannot apply to Puerto Rico merely because the Act states that it applies notwithstanding any other law. That surely would constitute the "monumental hoax" warned against by the First Circuit Court in Figueroa v. People of Puerto Rico, 232 F.2d 615 (1st Cir., 1956).

Any interpretation which maintains that the "locally inapplicable" phrase signifies that federal law applies to Puerto Rico insofar as intended by Congress, would mean that Congress reserved the right to unilaterally legislate upon Puerto Rico and change the terms of the compact. If so, Congress could legislate to completely annul the Commonwealth Constitution and return Puerto Rico to the even more precarious political status it occupied under the 1917 Jones Act. What then of the

position asserted by the U.S. before the United Nations, that all vestiges of colonialism have ended in Puerto Rico and that the compact, being stronger than a treaty, cannot be changed unilaterally by either of the parties? What about the compact itself? Was it an act of deceit by Congress upon the people of Puerto Rico? This Court should be mindful of these vital questions in its consideration of the issues in this case.

CONCLUSION

Extreme caution must be exercised when interpreting Congress' legislative powers vis-a-vis Puerto Rico when the viability of and alleged deference toward the Commonwealth Constitution, and U.S. Puerto Rico-relations are at stake. This is particularly so in the instant case wherein the wiretap provisions of the Crime Control Act, if made applicable to

P.R., have the effect of nullifying a fundamental provision in Puerto Rico's Constitution. The "locally inapplicable" term of the Federal Relations Act must be interpreted strictly. Puerto Rico's constitutional, historical, political, social and cultural uniqueness can render federal statutes locally inapplicable, regardless of the inclusion of Puerto Rico in their language. At a minimum, federal law must be found locally inapplicable in Puerto Rico when it runs contrary to an essential component of the Commonwealth Constitution. This is so because between 1947 and 1952, and through an extensive legislative and constitutional process, the United States President and Congress, and the people of Puerto Rico, agreed that it be so.

Accordingly, the judgment of the Court of Appeals for the Second Circuit should

be affirmed.

Respectfully submitted,

SARA E. RIOS
DAVID COLE
(Counsel of Record)
Center For Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6464

ROBERTO ROLDAN BURGOS
CHARLES HEY MAESTRE
Instituto Puertorriqueno de Derechos Civiles
Calle Blanco
Romano No.7, Tercer Piso
Rios Piedras, P.R. 00925
(809)754-7390

* Counsel for amici curiae greatfully acknowledge the significant contributions of Nancy Alisberg, Esq., and Carol Afariogun.